

Supreme Court, U.S.
FILED

(1)
No. — 05 - 818 DEC 22 2005

IN THE OFFICE OF THE CLERK
Supreme Court of the United States

ROBERT JON GROVER, DAVID SCHLECHT
and SARAH SCHLECHT,
Petitioners,

v.

NORTHWEST STEELHEADERS ASSOCIATION, INC.,
RAYMOND D. DEZELLEM, RICHARD "RICK" ALLEN, and STATE
OF OREGON, by and through the Oregon State Land Board,
Respondents.

**On Petition for Writ of Certiorari to the
Oregon Court of Appeals**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether the Oregon Court of Appeals correctly held that portions of the John Day River were navigable for title under federal law pursuant to the legal test set forth in *The Daniel Ball*, 77 U.S. 557, 19 L.Ed. 999 (1871), which requires that, at the time of statehood, the waterway was used, or was susceptible for use, as a highway for commerce over which trade and travel were or could be conducted in then customary modes of trade and travel on water?
- II. In deciding that the John Day River was navigable for title under federal law, did the Oregon Court of Appeals substitute for *The Daniel Ball* test a much less rigorous test, which requires mere evidence that a waterway is susceptible to being floated by Native American canoes, a test which has the practical effect of exposing hundreds, if not thousands of even extremely shallow waterways throughout the United States to being found navigable and upsetting the settled property right expectations of thousands of riparian landowners?

RULE 14.1(b) STATEMENT

The following were parties to the proceedings in the Oregon Court of Appeals and the Oregon Supreme Court:

1. NORTHWEST STEELHEADERS ASSOCIATION, INC., an Oregon nonprofit corporation, plaintiff-respondent;
2. RAYMOND D. DEZELLEM, plaintiff-respondent;
3. RICHARD "RICK" ALLEN, plaintiff-respondent;
4. STATE OF OREGON, by and through the Oregon State Land Board, defendant-respondent;
5. DAVID SCHLECHT, defendant-appellant/petitioner on review;
6. SARAH SCHLECHT, defendant-appellant/petitioner on review;
7. ROBERT JON GROVER, intervener-appellant/petitioner on review;
8. MIANI, WILLIAMSON & EVANS, defendant-appellants (in Oregon Court of Appeals only).

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No. ____

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**On Petition for Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Robert Jon Grover, David Schlect and Sarah Schlect ("Petitioners") respectfully petition for a Writ of Certiorari to review the judgment of the Oregon Court of Appeals in this case. Petitioners previously sought discretionary review of the Oregon Court of Appeals' decision from the Oregon Supreme Court. The Oregon Supreme Court denied the petition for discretionary review without issuing an opinion on the merits.

OPINIONS BELOW

The opinion of the trial court is unreported (App., *infra*, 5a-10a). The opinion of the Oregon Court of Appeals affirming the trial court (App., *infra*, 11a-36a) is reported at *Northwest Steelheaders Ass'n, Inc. v. Simantel*, 199 Or. App. 471, 112

P.3d 383 (2005). Grover and the Schlects jointly petitioned for review of this decision to the Oregon Supreme Court, the state court of last resort of the State of Oregon. On October 4, 2005, the Oregon Supreme Court issued its order denying the petition for review. This order (App., *infra*, 37a-38a) has not been officially reported.

JURISDICTION

The opinion of the Oregon Court of Appeals was entered on May 11, 2005. The Oregon Supreme Court denied a timely Petition for Review on October 4, 2005. The jurisdiction of the United States Supreme Court is invoked in a timely manner under 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

This case does not involve federal statutes. Rather, it involves the "equal footing doctrine" under the Northwest Ordinance, which held that new states are to be admitted into the United States on an "equal footing" with the original states. *An Ordinance for the Government of the Territory of the United States, Northwest of the Ohio River* (July 17, 1787), ("*Northwest Ordinance*"). Article 4 of the *Northwest Ordinance* stated that navigable rivers leading into the Mississippi and St. Lawrence Rivers shall be "common highways free to the inhabitants of the said territory and the citizens of the United States as well as any other state. . . ." *Northwest Ordinance*, Article 4. Pursuant to the "equal footing doctrine," as each state was admitted into the Union, title to the bed and banks of its navigable waterways passed from the federal government to the state, as an attribute of the state's sovereignty. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 228-29, 11 L. Ed. 565 (1845). The question posed by this case is whether the segments of the John Day River at issue were navigable in 1859 at the time of statehood so that title to the bed and banks of the River passed to the State of Oregon

under the "equal footing doctrine." If not navigable, the bed and banks of the River remained in federal ownership at the time of statehood and were thus capable of being transferred by the federal government to private purchasers as in this case.

STATEMENT OF THE CASE

This case involves the Oregon Court of Appeals' affirmation of the trial court's judgment that certain portions of the John Day River ("John Day River" or the "River") were navigable under federal law in 1859 at the time of Oregon statehood so that the ownership of the bed and banks of the River vested in the State of Oregon at that time under the "equal footing doctrine."¹ The case highlights the conflict between the fifty states along with recreational enthusiasts (looking for inexpensive recreational opportunities for primarily urban residents) and the private property rights of primarily rural residents who wish to preserve their ownership rights to the bed and banks of the streams that run through their lands.²

Petitioners contend that the Oregon Court of Appeals' decision distorts and significantly expands the concept of title navigability so that the states will be afforded a clear opportunity to claim the bed and banks of thousands of even the shallowest waterways throughout the United States in clear derogation of the private property rights of thousands of

¹ The stretches of the River involved in the case are between River miles 18 and 33 in the area of McDonald's Ferry, near where petitioners Schlect own property and River miles 133 and 135 in the area of Burnt Ranch. (Tr. Vol. 7, pp. 13, 91.) The transcript of proceedings will be referred to herein as "Tr. Vol." Exhibits entered into evidence at trial will be referred to as "Ex."

² It also poses a conflict between the federal government and the states because lands along nonnavigable rivers were not ceded to the states upon their admission to the Union and hence remained as federal property. Many of these lands were never transferred to private ownership.

landowners who, for many generations, have considered themselves to be the owners of the bed and banks of waterways that have traditionally been considered nonnavigable. Rather than obtaining property for parks and recreational purposes by compensating landowners for the taking of their property under the Fifth and Fourteenth Amendments to the United States Constitution, the states are instead offered a shortcut method to grab historically private land by the Oregon court's expansive and unprecedented definition of navigability, a definition that would render any stream upon which a Native American canoe can be floated during portions of the year a navigable waterway and which goes well beyond any prior decision of this Court.

All parties below agreed, as did the Oregon Court of Appeals, that the applicable federal test for navigability is that established by this Court in *The Daniel Ball*, 77 U.S. 557, 563, 19 L. Ed. 999 (1870):

Those rivers . . . are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as *highways for commerce*, over which *trade and travel* are or may be conducted in the customary modes of trade and travel on water. [Emphasis added.]

Because the federal test applies to the conditions of the waterway at the time of statehood, the parties presented substantial historical evidence at trial regarding the conditions and practices existing in the John Day River basin in the nineteenth century. Oregon was admitted to the Union on February 14, 1859. Throughout this litigation, petitioners herein have contended and shown that the John Day River was not navigable under federal law so that title to the bed and banks of the River did *not* pass to the State of Oregon when it was admitted to the Union.

While there were some disputed facts at trial, the majority of relevant evidence was not in dispute. The John Day River, a tributary of the Columbia River, runs from its headwaters in

the Blue Mountains through portions of central Oregon into the Columbia River. (Ex. 265, p. 8.) Petitioners David and Sarah Schlect own property in the area of McDonald's Ferry. (Tr. Vol. 7, pp. 83, 91.) Petitioner Robert Jon Grover, while not an owner of property on the segments of the River at issue herein, owns property at another location on the John Day River. He moved to intervene and was granted party status by the trial court.

The evidence established that, while Native Americans lived in both the lower and upper reaches of the John Day River, there is *no* historical evidence documenting any Native American canoe use on the John Day River. (Tr. Vol. 2, pp. 23, 133.)³ Although European trappers and later anthropologists documented canoe use on other rivers by other Native Americans living in the region, no one ever documented such use by Native Americans on the John Day. (Tr. Vol. 2, pp. 124-25, 130; Ex. 265, p. 12.) Archeological surveys in the area also did not uncover any evidence of Native American canoe use, although they did document the use of Native American foot trails directly along the banks of the River. (Ex. 121, pp. 8-9.)

Despite the lack of historical evidence of Native American canoe use on the John Day, an historian hired by the respondents, Professor Steven Beckham, testified that Native Americans used dugout canoes on other rivers throughout the Columbia Plateau. (Tr. Vol. 2, p. 23.) The Columbia Plateau is an expansive area reaching north from the interior of British Columbia and south to the headwaters of the Deschutes River, east from the Snake River and west to Hood River, Oregon. (Tr. Vol. 2, pp. 132-33, 136.) According to Professor Beckham, these canoes, which typically drafted

³ The Tenino (speakers of the Sahaptin language) occupied the lower stretch of the River, before River mile 100. The upper part of the watershed was inhabited by the Northern Paiute (otherwise known as Snake or Shoshone), speakers of a different language. (Tr. Vol. 2, pp. 22-23.)

only six to eight inches, were used for travel, fishing and transport of obsidian, dried salmon, bear grass, shells, smelt and other items on the Columbia River. (Tr. Vol. 2, pp. 110-11.) Based on historical evidence that Native Americans fished from canoes on other rivers in the Columbia Plateau (but not on the John Day River), Professor Beckham testified that there was no reason why the Tenino, who lived in the lower John Day River basin, would not also have fished from canoes on the John Day River.⁴ (Tr. Vol. 2, p. 271.)

Evidence of early pioneer use of the John Day River was scant. Brigades from the Hudson Bay Company exploring the John Day River did so by horseback and not by boat. (Tr. Vol. 2, pp. 32-33.) Fur trappers used the Deschutes River, a river approximately 25 miles west of the John Day River, to ship furs back to the Hudson Bay Company forts, but did not use the John Day River for this purpose. (Tr. Vol. 2, pp. 32-33, 138.)

In 1858, the United States Army was looking for an expeditious route to move troops and material against the Mormons in Salt Lake City. (Tr. Vol. 2, p. 43.) The Army explored the region by horseback and not by boat. Army reports confirmed that the nearby Deschutes River could prove to be navigable, but there was no such conclusion in regards to the John Day River. The explorations led to the building of a wagon road in the vicinity as a means to provide a highway for commerce through the John Day River country. (Tr. Vol. 2, pp. 43-44, 221-23.)

In 1861, gold was discovered in the upper John Day River Valley (Ex. 265, p. 31.) This triggered a gold rush in 1862. There was no evidence that the John Day River was ever used to transport gold. (Tr. Vol. 2, p. 216.) Miners, pack trains carrying food and mining equipment, express riders carrying

⁴ However, Professor Beckham did not testify that Native Americans used the John Day River to transport goods to be traded.